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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1256

HARTLE M. BOWNESS,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 14-16) affirming the judgment of the conviction is reported at 504 F.2d 391 (5th Cir. 1974).

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 17) was entered on November 18, 1974. A petition for rehearing, filed on November 29, 1974, embodying a suggestion that it be *en banc*, was denied on March 4, 1975. (App. C, *infra* p. 18.)

The motion for stay of mandate was filed on March 11, 1975, and was granted on March 31, 1975, staying the mandate to and including April 3, 1975, conditioned upon filing the petition for certiorari by such date. (App. D and E, respectively, pp. 19 and pp. 20.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the defendant, charged with violation of 26 U.S.C. Section 7201, a tax felony statute, was entitled to a lesser-included offense charge to the jury under 26 U.S.C. Section 7207, a tax misdemeanor statute, where all three elements of the felony statute were submitted to the jury and two of the three elements of the felony statute were also the elements of the misdemeanor statute.

RULES AND STATUTES INVOLVED

Rule 31(c) of the Federal Rules of Criminal Procedure in pertinent part provides:

> "The defendant may be found guilty of an offense necessarily included in the offense charged . . ."

Sections 7201 and 7207 of the Internal Revenue Code of 1954 (26 U.S.C.) in pertinent part provides:

> Section 7201 - Attempt to Evade or Defeat Tax
> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than five years, or both, together with the costs of prosecution."

Section 7207 - Fraudulent Returns, Statements, or other Documents.

"Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return account, statement or other document known by him to be fraudulent or false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both . . ."

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida (Orlando Division) in April, 1972, petitioner was convicted on three of four counts for income tax evasion, in violation of 26 U.S.C. Section 7201. Petitioner was fined $3,000 as to each count, plus costs of prosecution. He was sentenced to eighteen months, with 90 days confinement, and the balance thereof suspended. Petitioner was permitted to remain free on bond pending conclusion of the appeal phases of the case, said fines and costs of prosecution having been paid by the defendant.

Petitioner, born in Halifax, Nova Scotia, was a resident of the small town of Ocoee, near Orlando, Florida, since he was a small child. His formal education was at high school level.

Petitioner, who lost one eye while quite young, had suffered polio which withered one of his arms when he was a child. Since 1934, petitioner worked with his father in a filling station at Ocoee in partnership, until his father's death in 1960. From 1960 through 1967, petitioner operated as a sole proprietor. The business involved the sale of bulk fuel oil and kerosene, and related automotive products. He also derived investment income.

The four-count indictment returned in March, 1971, alleged that petitioner had evaded a large part of his federal income taxes and of his wife for the taxable years 1964, 1965, 1966, and 1967 by filing false and fraudulent federal income tax returns. The amounts of income tax allegedly evaded were $12,453.05, $2,814.09, $13,142.25, and $15,561.35, respectively, for the years involved.

The jury returned a verdict of guilty on three of the four counts (1954, 1956, and 1967) but acquitted petitioner on one count (1965).

The United States employed a so-called "net worth" plus expenditures method of proof, thus utilizing an indirect method of calculating the alleged income of the petitioner for the years involved. The taxable income as so calculated was in issue in the Court below as were all elements of the offense charged.

All elements of the alleged violation under Section 7201 (the felony statute) were submitted to the jury for their determination. The jury was instructed by the trial court that it might find, based upon the net worth plus expenditures method of proof, that petitioner had understated his taxable income, and that if so, it should proceed further to determine whether the government had established the other elements of Section 7201.

Petitioner requested that instructions be given to the jury that the jury might find a defendant guilty of a lesser crime than charged in the indictment; that the jury might find a defendant guilty of any lesser offense which is necessarily included in the crime charged. In particular, the petitioner requested (defendant's requested instruction number 50) that the jury be given an instruction that they might find a vio-

lation of Section 7207 of the Internal Revenue Code of 1954 (26 U.S.C. Section 7207), as a lesser-included offense of Section 7201. (See App. F *infra*, pp. 21).

Such requested instruction was refused by the trial court and not given to the jury, and exceptions taken.

The Court of Appeals sustained on the ground that the term "wilfully" as used in Section 7201, the felony statute, did not imply less scienter than the same word as used in Section 7207, the misdemeanor statute, and stated ". . . the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence the District Court properly refused the requested lesser-included offense instruction based on respondent's erroneous contention that the word "wilfully" in the misdemeanor statute implied less scienter than the same word in the felony statute. *United States v. Bishop* (1973, 412 U.S. 346) . . ."

The Court of Appeals in its *per curiam* opinion, however, did not separately discuss the petitioner's main argument under the lesser-included offense charge, relying in lieu thereof upon its *per curiam* affirmance of the lower court.

The Court of Appeals, in its opinion, dealt only with petitioner's alternative argument, relating to the meaning of the word "wilfully," which was resolved by this Court's opinion in *United States v. Bishop, supra.*

Petitioner had maintained in the trial court and before the Court of Appeals that where all material elements of the felony statute (Secton 7201 of 26 U.S.C.) went to the jury, that he was entitled to an instruction under the lesser-included offense statute (Section 7207 of 26 U.S.C.).

The particular language of the indictment in this case was

couched in language similar to that found in Section 7207. The indictment in part stated:

> ". . . Hartle M. Bowness . . . did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America . . . by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, Florida, *a false and fraudulent* joint income tax *return* on behalf of himself and his said wife . . ." (emphasis added)

REASONS FOR GRANTING THE WRIT

We submit that the decision of the Court of Appeals is in conflict with this Court's decision in *Sansone v. United States*, 380 U.S. 343 and with other decisions of the Court of Appeals as discussed below.

Rule 31(c) Fed. R. Crim. P., incorporates the general rule that a defendant is entitled to have the jury instructed as to a lesser-included offense.

Section 7207 of the Internal Revenue Code of 1954 is a misdemeanor statute and applies where a person ". . . wilfully delivers or discloses to the Secretary or his delegate any list, return, account statement, or other document, known by him to be *fraudulent* or to be *false* as to any material matters . . ."

In this case, petitioner was indicted for four taxable years under Section 7201 of the Internal Revenue Code of 1954 which provides in part that: "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title . . . shall . . . be guilty of a felony . . . ."

Under the indictment in this case, it was charged in each

count, that petitioner ". . . did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife . . . by filling and causing to be filed . . . a *false* and *fraudulent* joint income tax *return.*" (Emphasis added.)

The language of the indictment under Section 7201 embodies the emphasized language from Section 7207.

The petitioner contended that the lesser-included offense charge should have been given by the District Court on two alternative grounds, i.e., (1) that under *Sansone v. United States* (1965) 380 U.S. 343 and recent opinions of the Courts of Appeal, he was entitled to such a charge, as a matter of right, and (2) that under *Bishop v. United States* (C.A. 9, 1972) 455 F.2d 612, a lesser-included offense charge was required, as "wilfully" differed as used in the felony statute, Section 7201, from the misdemeanor statute, Section 7207. This second argument, resolved by the Supreme Court in *Bishop v. United States* (1973) 412 U.S. 346, was discussed in the Court of Appeals' opinion of November 18, 1974. The first contention was not discussed nor decided by *Bishop*. We submit that clear and affirmative authority for the petitioner's first contention is provided by this court in *Sansone*, and in certain Court of Appeals' opinions. We submit that the Court of Appeals' decision in this case is inconsistent with *Escobar v. United States* (C.A. 5th 1957) 388 F.2d 661, and its opinion in *United States v. Edward Cook*, No. 74-1164, decided December 20, 1974 ..... F.2d ..... (5th Cir. 1974).

The fundamental argument of the petitioner was that as a matter of right, since all the elements under Section 7201 went to the jury, he was entitled to a lesser-included offense charge, under Section 7207. We submit this argument was not resolved by *Bishop* against petitioner, as the Court of Ap-

peals' opinion of November 18, 1974, implies. Rather, we submit that decisions of this Court and the United States Court of Appeals for the Second Circuit hold that such instruction should have been given in the lower court.

Sansone v. United States, 380 U.S. 343 (1965) held that Section 7207 of the Internal Revenue Code was a lesser-included offense, within Section 7201 of the Code. The Court stated:

> "We conclude, therefore, that §7207 applies to income tax violations. Since there is no doubt that §§7201 and 7203 also apply to income tax violations, with obvious overlapping among them, there can be no doubt that the lesser-included offense doctrine applies to these statutes in an appropriate case. See Spies v. United States, 317 U.S. 492, 495 (30 AFTR 378); Berra v. United States, supra,"
>
> X X X
>
> ". . . A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense."
>
> X X X
>
> ". . . Therefore, if on the facts of a given case there are disputed issues of fact which would enable the jury rationally to find that, although all the elements of §7201 have not been proved, all the elements of one or more lesser offenses have been, it is clear that the defendant is entitled to a lesser-included offense charge as to such lesser offenses."

As noted in *Sansone*, elements of Section 7201 are (1) "Wil-

fulness"; (2) "the existence of the tax deficiency"; and (3) "an affirmative act constituting an evasion or attempted evasion of the tax." The elements of Section 7207 as noted in *Sansone* were:

> "Section 7207 requires the wilful filing of a document known to be false or fraudulent in any material manner. The elements here involved are wilfulness and the commission of the prohibited act. Section 7207 does not, however, require, that the act be done as an attempt to evade or defeat taxes. Conduct could therefore violate §7207 without violating §7201 where the false statement, though material, does not constitute an attempt to evade or defeat taxation because it does not have the requisite effect of reducing the stated tax liability."

Such rule was applied in *U.S. v. Coppola* (CA 2nd 1969) 425 F.2d 661, where the Second Circuit noted that the three elements of Section 7201 include the two elements under Section 7207, i.e., wilfulness and an affirmative act. The Second Circuit noted that *Coppola* had not placed in dispute one element of Section 7201, i.e., the question of a tax deficiency. As the contested elements in *Coppola* under Section 7201 were limited to two of the three potential elements of that statute, and those contested elements were the same as the elements of Section 7207, the lesser charge was not pertinent, since identical elements under both statutes remained in issue. The Second Circuit stated:

> "What he neglects to mention is that if he had placed in dispute a factual element required for conviction under §7201 but not for conviction under §§7203 or 7207, he too would have *had a right to a charge on the lesser included offense*. Sansone v. United States, 380 U.S. 343, 350 (1965). It was his own decision to admit

> rather than to contest the charges against him." (emphasis added)

Subsequent to the Supreme Court's *Bishop* case, the Second Circuit had occasion to refer to the lesser-included offense question in *Slutsky v. United States* 487 F.2d 832 (Cir. 2d 1973) cert. denied 94 S.Ct. 1937, Reh. den. 94 S. Ct. 2414, where the Second Circuit, after referring to *U.S. v. White*, 417 F.2d 89 (2d Cir. 1969) stated:

> "That view was premised on Sansone v. United States, 380 U.S. 343, 353 (1965) where the *Supreme Court held Sections 7202 and 7207 were lesser-included offenses within Section 7201 in an appropriate case.*" (emphasis added)

See also, *Rosenthal v. United States* 454 F.2d 1255 (2d Cir. 1972).

The Supreme Court's decision in *Bishop* discussed in the Circuit Court's opinion in the instant case did not diminish the rule of law set forth in the *Sansone* case. The question before the Supreme Court in *Bishop* was whether the term "wilful" as used in the misdemeanor statute meant something less than in the felony statute.

We also submit that the holding of the Court of Appeals in the instant case is inconsistent with its opinions in *Escobar v. United States* (5th Cir. 1967) 388 F.2d 661, cert. denied, 390 U.S. 1024 and *United States v. Edward Cook, supra.* (Total independent of the quantum of wilfulness involved in *Bishop.)*

In *Escobar*, the defendant was indicted under the felony statute, Section 7206(1), (a false statement given under oath) *Escobar* contended that the Court erred in refusing to charge that the jury could find him guilty under 26 U.S.C.A. Section

7207 (misdemeanor) though he was indicted under 26 U.S.C.A. Section 7206(1). As noted in *Escobar*, for a Section 7206(1) charge, the document must contain a statement that it is "made under the penalties of perjury," an element of Section 7206(1) not found in Section 7207. A lesser-included offense charge would therefore have been appropriate, except that all returns involved contained declarations under the penalties of perjury. On this element, there was no factual dispute to go to the jury. Consequently, in *Escobar*, a lesser-included offense charge was not appropriate, on the facts of that case.

In *Escobar*, the Court of Appeals for the Fifth Circuit stated:

> "Section 7207 applies to income tax violations, Sansone v. U.S., 1965, 380 U.S. 343, 349 ..... S.Ct. ....., ... L.Ed. ..... Since the other statute involved (§7206 (1)) also applies to income tax violations, under the rationale of Sansone, 'the lesser-included offense doctrine applies to these statutes in an appropriate case.'" Ibid.
>
> X X X
>
> "In other words, the lesser-offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper when the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.
>
> "Accepting these guidelines, the question narrows to whether there is 'a disputed factual element' in §7206 (1) which is not presented in §7207. As pointed out the only difference between the two statutes is in the

> 'made under the penalties of perjury' requirement in §7206(1). If there was any question for the jury concerning whether some or all of the returns involved here were or were not 'made under the penalties of perjury' appellant would have been entitled, under Sansone, to the requested charge. However, appellee contends, and appellant does not dispute, that all returns involved here contain the 'perjury declaration.' Therefore, there was no factual dispute concerning the charged greater offense to be submitted to the jury, ergo appellant was not entitled to his requested charge. See Sansone v. U.S. at 354-355."

The instant case involved submission of all three elements of Section 7201 to the jury, two of which are also found in Section 7207. As the charged greater offense would require the jury to find a disputed element not required for conviction of the lesser offense, under *Sansone*, *Coppola*, and *Escobar*, the reequested charge should have been given, as a matter of right.

We submit that our contention is sharpened by paraphrasing the last paragraph of the opinion in *Escobar*, quoted above in this petition. This material is shown as a quotation, with the changed language italicized.

> "Accepting these guidelines, the question narrows to whether there is a disputed factual element in Section *7201* which is not presented in Section 7207. As pointed out, the only difference between the two statutes is *that the existence of a tax deficiency is* a requirement in Section 7201. If there was any question for the jury concerning whether some or all of the *years* involved a *deficiency*, that appellant would have been entitled, under Sansone, to the requested charge . . . . There-

fore, *as* there was . . . *a* factual dispute concerning the charged greater offense to be submitted to the jury, ergo appellant *was* "entitled to his requested charge. See Sansone v. United States at 254-255."

CONCLUSION

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted

CULVERHOUSE, TOMLINSON, MILLS,
DeCARION & ANDERSON

/s/ James D. O'Donnell

By: JAMES D. O'DONNELL
KENNETH G. ANDERSON
655 Florida National Bank Building
Jacksonville, Florida 32202

904/356-1351

April, 1975.

APPENDIX A

1100

UNITED STATES of America, Plaintiff-Appellee,

v.

Hartle M. BOWNESS, Defendant-Appellant.

No. 72-2160.

United States Court of Appeals,
Fifth Circuit.

Nov. 18, 1974.

Defendant was convicted before the United States District Court for the Middle District of Florida, George C. Young, Chief Judge, of three counts of wilfully attempting to evade or defeat a tax and he appealed. The Court of Appeals held that misdemeanor of wilfully delivering or disclosing fraudulent returns, statements or other documents was not a lesser included offense within felony of attempting to evade or defeat a tax.

Affirmed.

Internal Revenue ⇐2408

"Willfully" within statute making it a misdemeanor to deliver or disclose a fraudulent tax return did not imply less scienter than the same word as used in statute making it a felony to attempt to evade or defeat a tax and, therefore, the misdemeanor was not a lesser included offense within the felony. 26 U.S.C.A. (I.R.C.1954) §§ 7201–7241.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, BELL and COLEMAN, Circuit Judges.

PER CURIAM:

This appeal is from a judgment adjudicating the defendant guilty on three counts under Section 7201 of the Internal Revenue Code of 1954.

Chapter 75, subchapter A, of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 7201–7241, is concerned with tax crimes. Sections 7201–7207, inclusive, which in the aggregate relate to attempts to evade or defeat tax, to failures to act, and to fraud, all include the word "willfully" in their respective contexts. Specifically, Section 7201 is a felony statute and reads:

> § 7201. Attempt to evade or defeat tax
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7207 is a misdemeanor statute and reads:

> "7207. Fraudulent returns, statements, or other documents.
>
> "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. . . ."

The defendant-appellant, Hartle M. Bowness, contends that the wilfulness specified by the felony statute (§ 7201) means "bad or evil motive" but in the misdemeanor statute (§ 7207) means only "without grounds for believing that [the acts] were lawful or without care, or capriciously or with a careless disregard whether one has the right to so act". Bowness argues therefore that the district court erred in refusing to instruct the jury that the offense charged in section 7207 is a lesser included offense. In the district court and on appeal he

relied on United States v. Bishop, 9 Cir. 1972, 455 F.2d 612, in which the defendant made the same contention with respect to sections 7206 and 7207 as Bowness makes with respect to sections 7201 and 7207. The Ninth Circuit's holding in *Bishop* is contrary to this Court's holding in Escobar v. United States, 5 Cir. 1967, 388 F.2d 661, cert. denied, 390 U.S. 1024, 88 S.Ct. 1141, 20 L.Ed.2d 282.

The Supreme Court has reversed *Bishop*, holding that the word "willfully" has the same meaning in §§ 7206(1) and 7207, connoting the voluntary, intentional violation of a known legal duty, and the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence, the District Court properly refused the requested lesser-included-offense instruction based on respondent's erroneous contention that the word "willfully" in the misdemeanor statute implied less scienter than the same word in the felony statute. United States v. Bishop, 1973, 412 U.S. 346, 98 S.Ct. 2008, 36 L.Ed.2d 941.

Bishop disposes of the only substantial contention Bowness raises on appeal. We have, however, considered the appellant's other contentions. We hold that they have no merit.

Affirmed.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 72

No. 72-2160

D. C. Docket No. 71 18 Orl CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARTLE M. BOWNESS,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before WISDOM, BELL and COLEMAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 18, 1974

Issued as Mandate:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2160

U. S. COURT OF APPEALS
FILED
MAR 4 1975
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appelee,

versus

HARTLE M. BOWNESS,

Defendant-Appellant.

ON PETITION FOR REHEARING

(MARCH 4 , 1975)

Before WISDOM, BELL and COLEMAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX D

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

March 31, 1975

Mr. Kenneth G. Anderson
Attorney at Law
655 Florida National Bank Building
Jacksonville, Florida 32202

No. 72-2160 - U. S. A. vs. Hartle N. Bowness

MANDATE STAYED TO AND INCLUDING April 3, 1975
(SEE ORDER ENCLOSED)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Carol A. LeBlanc
Deputy Clerk

enc.

cc and enclosure to:
Mr. James A. Moreland
Mr. John L. Briggs
Messrs. Scott P. Crampton
Gilbert E. Andrews
Mr. Douglas E. McKinley

RECEIVED
APR 2 1975
Cobb, Howard, Morrison, Hall, DeCarlos & Anderson

APPENDIX E

U.S. COURT OF APPEALS
FILED
Mar 31 '75
EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARTLE M. BOWNESS,

Defendant-Appellant.

NO. 72-2160

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including April 3, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

RECEIVED
APR 2 1975
Cabaniss, Tomlinson, Mills, DeCarlos & Anderson

APPENDIX F

DEFENDANT'S REQUESTED INSTRUCTION NO. 50

Under the law you may find the defendant guilty of a lesser crime than charged in the indictment.

You may find a defendant guilty of any lesser offense which is necessarily included in the crime charged.

The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954). Omitting that part of the act which does not apply in this case, it reads as follows:

> "Any person who wilfully delivers or discloses to the Secretary (or the Treasury) or his delegate any... Return...or other document known by him to be false or fraudulent as to any material matter, and then the statute provides for the penalty.
>
> "Therefore, if you find beyond a reasonable doubt that (with respect to either or each of the counts in this indictment) the defendant wilfully delivered to the District Director of Internal Revenue at Jacksonville, Florida, his and his wife's Federal joint income tax return or returns for the years 1964, 1965, 1966 and 1967 which were known by him to be false or fraudulent as to any material matter, but you do further find that the defendant did not wilfully attempt to evade and defeat his tax by the filing of a false and fraudulent return, you will in your verdict say guilty of violating a lesser-included offense.

If you have a reasonable doubt as to whether defendant wilfully so delivered under any count or counts of this indictment his and his wife's Federal joint income tax return or returns which were known by him to be false or fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.

Sansone v. United States 380 U.S. 343 (1965)

Given_____
Given as amended____
Denied_____
Withdrawn_____

Denied

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for a Writ of Certiorari was this 3rd day of April, 1975, furnished to the Solicitor General of the United States, Washington, D.C.

/s/ JAMES D. O'DONNELL

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1256

HARTLE M. BOWNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on three counts of willfully attempting to evade large parts of his income tax liability during the years 1964 through 1967 by filing false and fraudulent income tax returns, in violation of 26 U.S.C. 7201. He was sentenced to 18 months' imprisonment, with 15 months suspended, placed on probation for three years, fined $9,000, and required to pay the costs of prosecution. The court of appeals affirmed (Pet. App. A 14-16).

Petitioner contends (Pet. 7) that the trial court erred in refusing to instruct the jury that it might find him guilty of the lesser included offense of filing a false return, in violation of 26 U.S.C. 7207. But such an instruction is inapplicable to the facts of this case. The only falsity charged in the indictment was that the tax

returns understated his true income and tax liability. If the jury found this falsity to have been proved (*i.e.*, if it accepted the government's reconstruction of what it claimed to be petitioner's true income) and further found the element of willfulness, petitioner was guilty of violating both 26 U.S.C. 7201 and 26 U.S.C. 7207, since the false statement constituted an attempt to evade or defeat the tax because it had the requisite effect of reducing the stated tax liability. On the other hand, if the jury did not accept the government's reconstruction, or did not find the element of willfulness, petitioner was guilty of neither offense. While the two provisions covered the same conduct, there was no basis in the evidence under which the jury could acquit of the greater (charged) offense and convict of the lesser (included) offense. Accordingly, the trial court correctly refused to so instruct the jury. See, *e.g.*, *United States* v. *Bishop*, 412 U.S. 346, 361; *Sansone* v. *United States*, 380 U.S. 343, 350-353; *Berra* v. *United States*, 351 U.S. 131, 134-135; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63; *Stevenson* v. *United States*, 162 U.S. 313, 314-316, 321-323.

Contrary to petitioner's further argument (Pet. 9), the decision below does not conflict with *United States* v. *Coppola*, 425 F.2d 660 (C.A. 2). There, the defendant pled guilty to income tax evasion, in violation of 26 U.S.C. 7201. On appeal, he challenged the constitutionality of that statute on the ground that it covered exactly the same ground as Sections 7203 and 7207, and was thereby void for vagueness. Although the court agreed that proof of the charges contained in the indictment would establish not only a violation of Section 7201 but also of Sections 7203 and 7207, it noted that the contention merely established that Sections 7203 and 7207 are lesser included offenses and not that Section

7201 was unconstitutional. However, the court did not hold that every Section 7201 charge required a lesser included offense instruction for Section 7207. As this Court held in *Sansone*, such a lesser included offense instruction is only required when the jury could rationally acquit the defendant of the greater offense and convict him of the lesser.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[1] *Escobar* v. *United States*, 388 F.2d 661 (C.A. 5), certiorari denied, 390 U.S. 1024, cited by petitioner (Pet. 10-12), is not to the contrary. The portions of the court's opinion in that case quoted by petitioner are in accord with the rule of *Sansone* that a lesser included offense instruction is appropriate where the charged greater offense requires the jury to find a disputed fact that is not required for conviction of the lesser included offense.